Hydrolines, Inc. and TNT Hydrolines, Inc. *and* Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO. Case 22–CA–16360

October 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On May 25, 1990, Administrative Law Judge James F. Morton issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondents filed cross-exceptions and a supporting brief, which also responds to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The complaint alleges that Respondent TNT Hydrolines, Inc. and Respondent Hydrolines, Inc. are affiliated business enterprises and constitute a single integrated business enterprise and a single and/or joint employer. The complaint further alleges that the Respondents are a ''partial successor'' of Harbor Commuter Services, Inc. and Harbor Commuter Holding, Inc. (collectively referred to as Direct Line), and have violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union.

The judge found that the Union had not demanded recognition in the appropriate unit and recommended dismissing the complaint. Assuming in the alternative that a proper demand for recognition was made, the judge concluded that the Respondents are a single employer but that they are not a successor employer and that therefore they did not have a bargaining obligation.

The Respondents except to the judge's conclusion that they are an integrated business enterprise and a single employer. The General Counsel excepts to the judge's conclusions that the Respondents are not a successor of Direct Line and that the Union did not make a proper demand for recognition. We reject the Respondents' exceptions and find merit in the General Counsel's exceptions.

I. BACKGROUND

TNT Limited is the parent corporation of the Respondent TNT Hydrolines, Inc. (Respondent TNT). Respondent TNT was originally incorporated in January 1983 as ''TNT Containerships, Inc.'' but changed its name in February 1988 to TNT Hydrolines, Inc. Respondent Hydrolines, Inc. (Respondent Hydrolines) was incorporated as ''TNT Hydrolines, Inc.'' in May 1986, apparently as a subsidiary of TNT Limited, and changed its name in 1987 to Hydrolines, Inc. when John Arwood became its sole owner.

John Arwood is the chairman and owner of Respondent Hydrolines, and chairman of the board of directors, and chairman of the corporation for Respondent TNT. Arwood explained his relationship to Respondent TNT as follows: TNT Limited is a publicly held company based in Australia. Arwood merged a number of his businesses with TNT Limited in 1977 becoming a ''partner with them and a number of existing and new businesses . . . .'' His two primary duties for TNT Limited are (1) serving as the chief executive of the All Trans International group of companies, of which Respondent TNT is one, and (2) finding and developing new business for the corporation[3] In 1984 he presented the idea of a waterborne passenger service to TNT Limited and it agreed that the idea was worth pursuing. Therefore, to pursue the idea of a waterborne passenger service, in May 1986, TNT Limited formed Respondent Hydrolines.[4] At some later date, according to Arwood, TNT Limited decided it was not certain that it wanted to proceed with a waterborne passenger service and Arwood personally assumed the opportunity. In 1987 Respondent Hydrolines became a privately held company owned solely by Arwood. In April 1987, Respondent Hydrolines purchased a type of vessel known as a ''hydrofoil'' and in 1988 contracted to purchase a catamaran.

In 1988, TNT Limited and/or Respondent TNT[5] renewed its interest in the passenger service business. Respondent Hydrolines determined that it would abandon its intentions of running the passenger service ''and instead would continue its operation of owning vessels which it would be prepared to charter to others.'' Thus, according to Arwood, Respondent TNT's

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that Respondent Hydrolines, Inc.'s direct out-of-state purchases exceeds $50,000 annually and that Respondent TNT Hydrolines, Inc. derives in excess of $50,000 annually from its operations in transporting passengers from New Jersey to New York. We find that the Respondents are, and at all times material have been, employers engaged in businesses affecting commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

[3] He is also a director of TNT Limited.

[4] Arwood explained that in 1986 TNT Limited entered into a worldwide program of prefixing a number of their corporations' names with the initials ''TNT.''

[5] Arwood's testimony was unclear regarding whether he was referring to TNT Limited rather than to Respondent TNT.

''present scope of business is to operate a passenger service by water between points in the Metropolitan New York area,'' and Respondent Hydrolines' primary business is chartering vessels for use by others.

Direct Line operated a ferry service for individuals commuting between various points in New Jersey and points in New York City. On March 8, 1989, the Union was certified as the exclusive collective-bargaining representative of a unit consisting of all full-time and regular part-time crewmembers, including captains, engineers, deckhands, and assistant deckhands employed on Direct Line's vessels. Direct Line and the Union entered into negotiations which resulted in a collective-bargaining agreement effective from April 10, 1989, to April 10, 1992.

On April 14, 1989, Direct Line and the Respondents entered into an agreement for the Respondents to provide waterborne commuter transportation service on routes previously serviced by Direct Line between Keyport and Highlands, New Jersey, and New York City. Direct Line agreed not to compete on those routes. The Respondents operate the catamaran and a vessel chartered from Direct Line on the Highlands run. Another vessel chartered from Direct Line provides commuter service on the Keyport run. The Respondents also (1) chartered four surplus vessels and purchased support barges from Direct Line; (2) subleased or were assigned certain leases that Direct Line had held; and (3) entered into an interim agreement with Direct Line to cover the period between April 14, 1989, and either the closing of the other agreement or May 22, 1989, whichever occurred earlier.[6] During the transition period Direct Line operated the service on behalf of the Respondents.

On May 10, 1989, after the Respondents had assumed the commuter ferry operations, the Union wrote to Thomas Bruyere, Respondent TNT's president, demanding recognition and bargaining. Arwood responded to the demand on May 19, 1989, stating that Respondent TNT did not employ any employees formerly in the Direct Line bargaining unit and stating further that Respondent Hydrolines did not recognize the Union as the representative of its employees.

II. SINGLE EMPLOYER

The complaint alleged and the judge found that the Respondents are a single employer. The Respondent has excepted to the judge's finding. We find no merit in this exception for the reasons discussed below.

The Board applies four criteria in determining whether separate entities constitute a single employer. These criteria are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control.[7] No one of the four criteria is controlling nor need all be present to warrant a single-employer finding.[8] The Board has stressed that the first three criteria are more critical than common ownership,[9] with particular emphasis on whether control of labor relations is centralized, as these tend to show ''operational integration.'' *NLRB v. Al Bryant, Inc*., 711 F.2d 543, 551 (3d Cir. 1983), and cases cited therein. ''[S]ingle employer status depends on all the circumstances of the case and is characterized by absence of an 'arm's length relationship found among unintegrated companies.''' Id. Accord: *Hahn Motors*, 283 NLRB 901 (1983).

Here, we find that the Respondents have interrelated operations. Respondent Hydrolines was formed by Respondent TNT's parent corporation, TNT Limited, with the intention of operating a waterborne passenger service, using the hydrofoil that the parent corporation was aware was available for purchase. The parent corporation became uncertain whether it wanted to proceed with that type of service. Arwood then became the sole owner of Respondent Hydrolines and continued to pursue the business venture. Respondent Hydrolines' intention of running the passenger service was abandoned, however, when TNT Limited, through Respondent TNT, renewed its interest in this service. Thus, Respondent Hydrolines' primary business became chartering vessels for use by others and Respondent TNT undertook to provide ferry services through the use of chartered vessels.

Significantly, there is no evidence that Respondent Hydrolines charters vessels to any person or company other than to Respondent TNT. Thus, Respondent Hydrolines' history shows a strong relationship to Respondent TNT's parent corporation and Respondent Hydrolines' definition of its own business purposes has borne a close relationship to Respondent TNT's and TNT Limited's business plans. Further, Respondents TNT and Hydrolines share a phone number, a telex number, and an address.[10] Also, the agreement among Direct Line, Hydrolines, and TNT, dated April 14, 1989, was signed for both of the Respondents by Arwood. The agreement provided that Direct Line would transfer its interest in certain barges to Respondent TNT. Whether payment would be by check or wire transfer would be at Respondents TNT and Hydrolines' option. Further, the downpayment would be paid by ''TNT and/or Hydrolines,'' and the bill of

[6] The closing occurred on May 8, 1989.

[7] See *Continental Radiator Corp*., 283 NLRB 234 at fn. 4 (1987).

[8] See *Blumenfeld Theatres Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980); *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989).

[9] *Airport Bus Service*, 273 NLRB 561 (1984), disavowed on other grounds in *St. Marys Foundry Co*., 284 NLRB 221 fn. 4 (1987).

[10] Arwood testified that the Respondents have separate boards of directors and separate bank accounts.

sale should be delivered to TNT and/or Hydrolines.[11] Thus, although the sale was to Respondent TNT, both of the Respondents assumed contractual obligations regarding the barges.

These facts suggest an absence of an arm's-length relationship between the Respondents. The Respondents argue, relying on testimony given by Arwood, ''that while there are business agreements between [the Respondents], they are best characterized as arm's length contractual relationships clearly spelled out in documents between the two parties.'' There are, however, no documents in the record which show such contractual relationships between the Respondents. We therefore find that there is a strong interrelation of operations between the Respondents.

We also find that the Respondents share common, although not identical, management. Minutes of a meeting of the board of directors of Respondent TNT dated May 8, 1989, show that the directors were John R. Arwood, Tibor Sallay, and J. Ross Cribb. Arwood signed the minutes as chairman. As noted earlier, Arwood is chairman of the corporation as well as chairman of the board of directors of Respondent TNT. Arwood is also the chairman, chief executive officer, and owner of Respondent Hydrolines.[12]

As chief executive officer of Respondent Hydrolines, Arwood makes the major decisions for that corporation and ''employs'' its personnel. Thomas Bruyere is president and chief operating officer of Respondent TNT and describes himself as the person responsible for all the operational aspects of Respondent TNT. Arwood, however, as chief executive officer of Respondent TNT, is responsible for Respondent TNT's profit and loss, reporting Respondent TNT's activities to its parent corporation, and for ''employment'' of its personnel. Arwood signed the April 14, 1989 agreement with Direct Line, as well as other documents, on behalf of Respondent TNT—as he also did on behalf of Respondent Hydrolines. Arwood is the sole manager of Respondent Hydrolines and is extensively involved with the management of Respondent TNT as its chief executive, chairman of the corporation, and chairman of the board of directors. Thus, although other persons may be involved in the management of Respondent TNT, we find that Arwood's exclusive management of Respondent Hydrolines and his extensive involvement in the management of Respondent TNT establishes significant common management between the Respondents.

The Respondents argue that they cannot have centralized control of their labor force because Respondent TNT has no labor force. Respondent TNT charters boats for its passenger services from Respondent Hydrolines, and these charters include the crews as well as the boats. The president of Respondent TNT, Bruyere, however, screened prospective employees before Respondent Hydrolines made a hiring decision because these employees performed duties essential to Respondent TNT's business. Also the Respondents admit in their brief that Bruyere ''exert[ed] some influence'' over Respondent Hydrolines' labor force to the extent that it was necessary to guard the interests of Respondent TNT. Arwood, as chief executive officer of Hydrolines, ''employ[s]'' its personnel. Although Arwood testified that Bruyere is the person primarily responsible for hiring, firing, and maintaining Respondent TNT's personnel, he also admitted that he, Arwood, as chief executive of Respondent TNT, is responsible for the employment of Respondent TNT's personnel.[13] Further, the April 14, 1989 agreement with Direct Line contains the following: ''TNT and/or Hydrolines intends to consider hiring employees of Direct Line to engage in the waterborne transportation services contemplated by this agreement.'' Direct Line agreed to provide information to ''TNT and Hydrolines'' regarding employees. In regard to this key factor we find that the Respondents have centralized control over labor relations and the labor force.

We find that the Respondents also have common financial control.[14] As chief executive officer of Respondent Hydrolines, Arwood decides which assets the corporation purchases, and how those assets will be deployed, and borrows money on the corporation's behalf. As chief executive officer of Respondent TNT, Arwood is responsible for its profit and loss. Also, as noted earlier, the agreement between Direct Line, and Hydrolines and TNT, dated April 14, 1989, was signed for both Respondents by Arwood. Checks drawn on Respondent TNT's account were cosigned by Arwood and another individual. Further, both of the Respondents assumed contractual obligations regarding the sale of barges from Direct Line to Respondent TNT. We therefore find that Arwood exerted financial control over both of the Respondents.

[11] The agreement also provided that Respondents TNT and/or Hydrolines intended to consider hiring employees of Direct Line.

[12] Documents introduced into evidence by the Respondents indicate that on May 8, 1989, Maureen E. Hamelin was acting secretary of Hydrolines, and acting assistant secretary of TNT Hydrolines, Inc.

[13] As noted, the Union sent its bargaining demand to Respondent TNT's president, Bruyere. Bruyere, however, did not respond. Rather, Arwood responded, and did so on behalf of both Respondents.

[14] Arwood testified that when Respondent TNT was first formed he owned 75 percent of it. In 1986 or 1987, however, TNT Limited bought his share of Respondent TNT. Whether there is common ownership between the Respondents is determined by Arwood's relationship with TNT Limited. Arwood is the sole owner of Respondent Hydrolines and he testified that in 1977 he merged a number of his businesses with TNT Limited ''becoming a partner with them and a number of existing and new businesses . . . .'' As we do not know the particulars of Arwood's relationship with TNT Limited, however, we decline to infer, as the General Counsel suggests, that Arwood has a considerable ownership interest in TNT Limited.

Based on the above, we find an interrelation of operations, common management, and centralized control of labor relations. Although common ownership was not established, the General Counsel established that there was common financial control of both Respondents.[15] Businesses that, at least nominally, are owned by different individuals may constitute a single employer.[16]

In this case the Respondents operate as ''a single integrated enterprise.'' Arwood is the moving force of both Respondents—controlling the management, labor relations, and finances of each one. The direct control which Arwood, Respondent Hydroline's sole owner, exercises over both of the Respondents is extensive and ''establishes the lack of the arm's-length relationship found among unintegrated companies.''[17]

Other facts also suggest the absence of an arm's-length relationship between the Respondents. Thus, the Respondents share an address and phone number. In the contract with Direct Line regarding the sale of the barges, certain obligations, including the downpayment, were assumed by both of the Respondents although transfer of interest in the barges was to be only to Respondent TNT. Finally, we note that when Respondent Hydrolines became a privately owned corporation owned by Arwood, Respondent Hydrolines was able to purchase the hydrofoil and charter it to a subsidiary of TNT Limited. We note that Arwood, in 1984, took the idea of a waterborne passenger service to TNT Limited and that TNT Limited formed Respondent Hydrolines with the intent of operating such a service. Although Arwood testified that TNT Limited became uncertain whether it wanted to proceed with the venture, Arwood also stated his understanding that Federal law prohibited a foreign-held corporation from owning vessels used in commerce within this country. Ownership of Respondent Hydrolines was transferred to Arwood and then Respondent Hydrolines purchased the hydrofoil. Respondent Hydrolines, after it purchased the hydrofoil, changed its intent from running a passenger service to chartering vessels to others. TNT Limited's renewed interest in providing passenger service occurred after Respondent Hydrolines, an American-owned company, acquired a vessel that it was willing to charter. The creation of a company to supply equipment and labor to other companies is an important factor in determining whether those companies constitute an integrated operation.[18]

Thus, based on all the above, we find here an absence of the ''arm's length relationship found among unintegrated companies'' and therefore we find the Respondents to be a single employer.

III. SUFFICIENCY OF THE BARGAINING DEMAND

The complaint alleges that since May 19, 1989, ''Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.'' The unit is described in the complaint as ''[a]ll full-time and regular part-time crew members employed by Respondent on its vessels including captains, engineers, deckhands and assistant deckhands . . . .''

The judge found that the Union's May 10, 1989 letter demanding recognition was for a unit limited to ''those crew members who were formerly in Direct Line's employ.''[19] The judge found that the Union was aware that the crewmembers of the Respondents' catamaran had not been in Direct Line's employ and that the Union had never sought to represent these employees although they were within the unit alleged to be appropriate in the complaint.[20] The judge concluded, citing *EDP Medical Computer Systems*[21] and *Chester Valley, Inc.*,[22] that ''because the unit alleged as appropriate in the complaint deviated substantially from the unit in which the Union demanded recognition, no proper demand for recognition was made by the

[15] In *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1045–1046, affd. in relevant part sub nom. *South Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800 (1976), the court, in setting forth factors determinative of single-employer status, stated that interrelations of operations, common management, and centralized control of labor relations between two employers, whether or not present at the top level of management are '''controlling' indicia of the actual exercise of the power of common ownership or financial control; and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the 'arm's length relationship found among unintegrated companies.'''

[16] In *Mr. Clean of Nevada*, 288 NLRB 895 (1988), single-employer status was found, despite separate ownership, based on a single individual's control over management, labor relations, and finances of both businesses. In *Mr. Clean* one individual owned (his spouse was the only other stockholder) and operated one clothing cleaning business; that individual also hired, fired, set terms of employment for employees, signed checks, ordered supplies and sometimes signed legal documents, for another clothing cleaning business, which was a sole proprietorship belonging to another individual. Despite the absence of common ownership, the Board in *Mr. Clean* found that the two companies constituted a single employer.

[17] See *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 270 (1990). In *Il Progresso*, a finding of single-employer status was strongly supported by the fact that one individual played a ''critical role'' in two companies. Likewise here, Arwood's critical role in both companies provides substantial evidence of single-employer status.

[18] See *Consolidated Dress Carriers*, 259 NLRB 627, 633 (1981), enfd. in relevant part 693 F.2d 277 (9th Cir. 1982).

[19] Arwood's response to the Union's bargaining demand in essence denied that Respondent TNT employed any former Direct Line employees, denied that Respondent Hydrolines was a successor to Direct Line, and stated that Respondent Hydrolines did not recognize the Union as its employees' bargaining representative.

[20] The record shows that the Union received information that the catamaran would make the Highland run. We note also that the bargaining demand referred to both the boats and routes purchased from Direct Line and that all employees were trained to work on all the vessels.

[21] 284 NLRB 1232, 1282 (1987).

[22] 251 NLRB 1435, 1450 (1980), modified in other respects 652 F.2d 263 (2d Cir. 1981).

Union.'' The General Counsel has excepted to the judge's conclusion, and we find merit in his exception.

The judge, in finding that the Union demanded recognition in a unit comprising only those crewmembers who were formerly employed by Direct Line, relied on the following language in the Union's letter to the Respondents:

> As you may know, we are the collective bargaining representatives of the bargaining unit employees employed by (Direct Line) including those who work on the boats and routes, that your company has recently purchased from Direct Line.
>
> Under federal labor law, we continue to be the collective bargaining representative of your former Direct Line employees and your company is required to recognize us as such and bargain with us over the terms of a contract.

We note, at the outset of our analysis that, as stated in *Al Landers Dump Truck*:[23]

> The Board and the courts have repeatedly held that a valid request to bargain need not be made in any particular form, or in *haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.[24]

In *EDP Medical Computers* and *Chester Valley, Inc.*, the cases cited by the judge, the unions requested bargaining, based on card majorities, in clearly defined bargaining units that ''differed substantially'' (by excluding job classifications or plant locations) from the bargaining units alleged in the complaints and found appropriate.

A bargaining demand in a successorship situation is made in a different context, however, from demanding initial bargaining based on a card majority.[25] When a union demands bargaining based on a card majority, the union is aware of which group of employees it has been organizing and wishes to represent; the employer may not. On the other hand, in a successorship situation, the union, by making a bargaining demand, is attempting to preserve its status as the bargaining representative of an already defined unit, or that portion of the unit which has been conveyed or preserved. The successor, however, may add employees. It may add, eliminate, or change job classifications. It may have plans to expand or change its operations.[26] The union may be unaware, or at least uncertain, as to the successor's plans for its hiring and operations. Therefore, the union's bargaining demand may be made before it is clear which of the successor's employees belong in the unit, and the union cannot be expected or required to take all possible contingencies into account in making its demand to bargain.[27]

Here, the statements contained in the bargaining demand set forth the basis of the Union's bargaining demand, i.e., that the Union continued to be the bargaining representative of the former Direct Line employees. Further, the Union enclosed with its bargaining demand a copy of the Union's contract with Direct Line, which included a bargaining unit description like the one in the complaint and which set forth the unit job classifications. Under these circumstances, any fair reading of the Union's demand letter requires the conclusion that the Union sought to represent the Respondents' employees—not just the former Direct Line employees apart from other employees.[28] At the very least, the Union's demand shifted the burden to the Respondents to contact the Union and seek clarification of the bargaining demand.[29]

In the circumstances here, the Union's demand reasonably informed the Respondents that the Union considered the Respondents to be a successor to Direct Line and that the Union sought to represent the Respondents' employees. Thus, we find that the Union made a proper and legally sufficient demand for recognition and bargaining in an appropriate unit.

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[23] 192 NLRB 207, 208 (1971), enfd. sub nom. *NLRB v. Cofer*, 637 F.2d 1309 (9th Cir. 1981).

[24] See also *Trucking Water Air Corp*., 276 NLRB 1401, 1407 (1985); *Yolo Transport*, 286 NLRB 1087 fn. 2 (1987).

[25] As indicated we agree with the General Counsel that the Respondents are successors of Direct Line. See discussion infra.

[26] Here for example, because of changes in job duties, there were issues of whether certain former Direct Line employees were bargaining unit employees when they were employed by the Respondent. See fn. 30 infra.

[27] The Board, with the approval of the Supreme Court, has previously recognized some of the unique problems a union faces when making a bargaining demand to a successor employer. Thus, in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 52–53 (1987), the Court held that the ''continuing demand'' rule is reasonable. The Court reasoned that the rule ''places a minimal burden on the successor and makes sense . . . .'' The Court noted that this was true ''[b]ecause the union has no established relationship with the successor and because it is unaware of the successor's plans for its operations and hiring, it is likely that, in many cases, a union bargaining demand will be premature.'' The Court noted, by contrast, that in the initial recognition context the union ''is in the best position to have access to the relevant information—whether the union has the majority support of the employees.'' Id. at 53 fn. 19.

[28] The issue of whether the crew of the catamaran was part of the unit is a question of unit inclusion or exclusion rather than one of unit scope.

[29] We find that any doubt that the Respondents had regarding the bargaining unit that the Union had sought to represent was removed when the complaint issued setting forth the unit alleged to be appropriate. See *East Texas Steel Casting Co*., 191 NLRB 113 (1971), enfd. 457 F.2d 879 (5th Cir. 1972); see also *Santa Barbara Humane Society*, 302 NLRB 833 fn. 1 (1991) (any doubt regarding the identity of the union—i.e., as a successor union to the certified bargaining representative—demanding bargaining was removed by the issuance of the complaint). See also *Trucking Water Air Corp*., 276 NLRB 1401, 1407 (1985).

IV. SUCCESSORSHIP

The judge concluded that the Respondents are not a successor to Direct Line. The General Counsel has excepted. We find merit in that exception.

An employer, generally, succeeds to the collective-bargaining obligation of a predecessor if a majority of its employees, consisting of a ''substantial and representative complement,'' in an appropriate bargaining unit are former employees of the predecessor and if the similarities between the two operations manifest a '''substantial continuity' between the enterprises.'' *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 41–43 (1987), citing, inter alia, *NLRB v. Burns Security Services*, 406 U.S. 272, 280 fn. 4 (1972).

The Supreme Court in *Fall River*, supra at 43, summarized the factors relevant to determining continuity as follows:

> [W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products and has basically the same body of customers.

These factors are assessed primarily from the perspective of the employees, that is, ''whether 'those employees who have been retained will . . . view their job situations as essentially unaltered.''' Id., quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). Further, although each factor must be analyzed separately, they must not be viewed in isolation and, ultimately, it is the totality of the circumstances which is determinative. See *Fall River*, supra.

Here, the Union, as found above, made a proper demand for bargaining on May 10, 1989. At that time the Respondents had no more than 13 employees[30] in the bargaining unit. A majority, seven, had been in the bargaining unit at Direct Line.[31]

Having found that the unit at the critical times consisted of a majority of former Direct Line employees, we address continuity in the employing enterprise. Prior to its negotiations with the Respondents, Direct Line operated a passenger service from Highlands, New Jersey, to Pier 11 in New York City; from Keyport, New Jersey, to Pier 11 in New York City; from Bayonne, New Jersey, to New York City; and a shuttle between the Pan Am Airlines terminal in LaGuardia and two ports on the East River. In its April 14, 1989 agreement with the Respondents, Direct Line agreed that it would cease providing waterborne transportation services within the New York City metropolitan area and all points along the coastline of New Jersey. It gave the Respondents ''the exclusive right as between [Direct Line and the Respondents] to provide such waterborne commuter, excursion and other transportation within the Service Area . . . .''[32] This agreement also provided that Respondent Hydrolines would enter into one or more bare-boat charter agreements with Direct Line, would charter certain surplus vessels, and that Respondent TNT would purchase certain barges from Direct Line. The agreement stated that ''TNT and/or Hydrolines intends to consider hiring employees of Direct Line to engage in the water transportation services contemplated by this agreement.'' Direct Line agreed to provide the Respondents TNT and Hydrolines with information regarding employees.

The Respondents and Direct Line entered into an ''Interim Operating Agreement'' on April 14, 1989, which provided, inter alia, that, until the closing or May 22, 1989, whichever occurred earlier, Direct Line would provide service between Keyport and Highlands, New Jersey, and New York City. All profits and losses would be considered those of the Respondents. Thus, during the transition there was no interruption of service.

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[30] The judge found that, as of the date of the Union's bargaining demand, the Respondents employed 12 unit employees, 7 of whom had been unit employees at Direct Line. The General Counsel excepts to the judge's finding that Gary Dunzelman was a supervisor when he was employed by Direct Line. We find no merit in this exception. The judge concluded, and we agree, that Dunzelman was a supervisor and not part of the bargaining unit at Direct Line but that Dunzelman became a nonsupervisory employee and thus part of the bargaining unit for the Respondents. Thus, the judge did not count Dunzelman as part of the union majority in the Union's efforts to represent the Respondents' employees.

The Respondents except to the judge's conclusion that Brian Haines and Jimmy Haines should be excluded from the bargaining unit as nonvessel employees. We find this exception to be without merit as there is insufficient evidence that either of the Haines perform unit work on a regular basis. The judge found that Judy Prish was not a member of the bargaining unit at the time the bargaining demand was made. The Respondents except to this finding. We find this exception to be without merit as the judge made a credibility resolution that Prish did not apply for employment until after the Union had made its bargaining demand. The Respondents except to the judge's finding that Lyndon Kibler, who had not been employed by Direct Line, is a supervisor and should be excluded from the bargaining unit. Kibler is a ''senior captain'' and the record indicates that he possesses indicia of supervisory status. Assuming for the sake of argument that Kibler is part of the bargaining unit, we note that the bargaining unit on the date that the bargaining demand was made nonetheless consisted of a majority of former Direct Line bargaining unit employees. We therefore find it unnecessary to pass on the exception.

[31] Arwood testified that the intent was ''to man up to 14 people at watergoing jobs.'' At the time that the bargaining demand was made there were 13 individuals employed on vessels, at least 12 of whom were bargaining unit members. We therefore find that at the time that the bargaining demand was made the Respondent had hired a substantial and representative complement of which a majority had been employed in the bargaining unit by the predecessor.

[32] Direct Line retained, however, the right to continue to provide the existing waterborne commuter transportation service between Bayonne, New Jersey, and New York City as well as the ''Pan Am Shuttle.''

According to Arwood, at the time the Respondents began to negotiate with Direct Line, Respondent Hydrolines already owned a new catamaran and a hydrofoil.[33] Arwood described the catamaran as ''a luxurious accommodation'' and the vessels chartered from Direct Line as originally having been built to service the offshore-drilling industry. The passenger capacity on the catamaran is 265; the highest capacity of any of the vessels chartered from Direct Line is 149. The catamaran is also faster than the vessels chartered from Direct Line. The catamaran is used more often for charters and excursions than the vessels chartered from Direct Line.

The Respondents have two crews of four employees each for the catamaran and one crew of three employees for each of the other two vessels. Arwood testified that the catamaran is required, by the U.S. Coast Guard, to be operated under total radar control, which requires the captain to have a radar license. This was not a requirement at Direct Line. The crews, including the crew of the catamaran, were all cross-trained, but the record does not reflect the amount of training required. According to Arwood, he hired former Direct Line employees for the positions that they had represented to him that they had occupied at Direct Line.

The Respondents operate the catamaran and a vessel chartered from Direct Line on the Highlands to Pier 11 run. Another vessel chartered from Direct Line provides commuter service between Keyport and Pier 11.[34]

The two vessels referred to above were chartered from Direct Line by the Respondents for a period of 16 months for each vessel, with the option to renew for an additional 6 months. The Respondents agreed to charter four surplus vessels for a 12-month term from Direct Line[35] and also purchased support barges from Direct Line.

The Respondents also were assigned leases which Direct Line had for certain physical facilities. These leases included part of one floor of a building, space at pierside, certain riparian rights and vessel docking space at Port Monmouth, New Jersey, and a lease and permission to operate within the town of Keyport, New Jersey. Also, Direct Line assigned its excursion charters, beginning May 1, 1989, to the Respondents. Thus, through sales, charters, assignments, and the no-competition agreement, the Respondents operate with a substantial amount of assets acquired from Direct Line.[36]

The facts here, under the totality of the circumstances criteria approved in *Fall River*, supra, point to continuity in the employing industry. The judge, without discussing the relevant factors set forth in *Fall River*, concluded that the Respondents were not a successor to Direct Line based on the following:

(1) The Respondents were already committed to providing passenger service on the same routes as Direct Line before negotiating with Direct Line; (2) the catamaran, valued in excess of $2 million[37] ''offered an entirely new commuting concept''; and (3) the catamaran and its crew were not ''a mere appendage to a fleet consisting of just the vessels leased from Direct Line, and to a Union crew of just seven former Direct Line employees.''

An employer, however, may take over only a part of the operations of the predecessor and still be deemed a successor employer. Also, successorship is not precluded because the entire bargaining unit is not transferred to the new employer.[38]

In regard to continuity, *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981), is informative. In *Stewart* the Board held that the new employer's ''acquisition of the [predecessor's manufacturing plant but not its granite quarries] did not result in the inappropriate 'fragmentation' of a previously homogeneous grouping of employees.''[39] Instead, the acquisition resulted in a separation of the plant workers from the ''functionally and geographically distant'' employees working in the quarries. The Board concluded in Stewart that the new employer was a successor employer.

Here the predecessor bargaining unit was a more homogeneous group of employees than the bargaining unit involved in *Stewart*. The Board, however, has found successorship even though the alleged successor took over a part of the predecessor's operations, and thereby divided a bargaining unit that had consisted of a very homogeneous group of employees.[40]

[33] At the time the hearing in this case was held the hydrofoil had not been put into service but was used as a backup vessel.

[34] Arwood testified that at the time of the hearing Respondents had added a stop at 69th Street, Brooklyn, New York, to the service provided from Keyport, New Jersey, to Pier 11.

[35] Direct Line agreed to ''use its best efforts to sell or otherwise dispose of'' these vessels during that 12-month period, and could recall these vessels at anytime.

[36] Whether assets are leased or purchased is not ''of great significance'' in determining successorship obligations under the Act. See *Band-Age, Inc*., 217 NLRB 449 (1975), enfd. 534 F.2d 1 (1st Cir. 1976).

[37] In the judge's decision he inadvertently stated the value of the catamaran as in excess of $12 million.

[38] See *Miami Industrial Trucks*, 221 NLRB 1223, 1224 (1975).

[39] The union had been the bargaining representative of a single unit of employees at the predecessor's manufacturing plant and two granite quarries. The new employer acquired only the manufacturing plant.

[40] For example, in *Boston-Needham Industrial Cleaning Co*., 216 NLRB 26 (1975), enfd. 526 F.2d 74 (1st Cir. 1975), the Board found successorship where the respondent obtained the cleaning contract which the predecessor had performed at an RCA facility. In finding successorship the Board noted that the size and organizational structure of the respondent was comparable to the predecessor, the control of personnel was retained by RCA, and that the single location unit was an appropriate unit.

In another case relevant here, *Louis Pappas' Restaurant*, 275 NLRB 1519 (1985), the Board found successorship where the respondent acquired a portion of the predecessor's operation.[41] The union sought recognition in a unit of all employees of the alleged successor.

The Board noted in *Louis Pappas*,[42]

> that successorship obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute a separate appropriate unit, and they comprise a majority of the unit under the new operation. [Citations omitted.]

The Board found that the requested unit was appropriate as the restaurant, warehouse, bar, and gift shop conveyed to the successor were located close to one another and all the employees working at those facilities performed functions directly related to the restaurant operation. In finding successorship, the Board noted that the alleged successor was engaged in the sale of food, gifts, and liquors, as was its predecessor.

This case is more analogous to *Stewart* and *Louis Pappas* than to *Nova Services Co.*, 213 NLRB 95 (1974),[43] relied on by the judge in finding no successorship. Here, as in the former cases, the Respondents took over a significant portion of the predecessor's operation and continued to operate the acquired portion in a manner similar to that of the predecessor.[44] Further, the unit sought by the Union constitutes a separate appropriate unit.

The totality of the circumstances persuades us that the Respondents are a successor to Direct Line.[45] Contrary to the judge, we find that the Respondents' operation is substantially similar to that of the predecessor. The successor provides the same services and the bargaining unit members perform the same duties and functions as they did under the predecessor. The Respondents and Direct Line engage in the business of waterborne passenger services, which include commuter, charter, and excursion services. Direct Line agreed not to compete with the Respondents on certain commuter routes that Direct Line had served, and the Respondents were assigned excursion contracts from Direct Line. There was no hiatus between Direct Line's discontinuing the operation and the Respondents' commencing the operation. Particularly from the point of view of the unit employees—i.e., the point of view that Fall River emphasizes—there is a substantial continuity in the employing industry. The Respondents are providing the same type of service on the same routes, to the same body of customers as Direct Line. Further, two of the three primary vessels used by the Respondents were used by Direct Line, the Respondents' facilities were used by Direct Line, and most of the bargaining unit employees were hired and worked in the same job classifications, for the Respondents as they had for Direct Line. The Respondents' use of a catamaran—a vessel of considerably higher speed than the vessels used by Direct Line—does not alter the basic nature of the operation, i.e., one of supplying waterborne passenger service. These facts demonstrate a substantial continuity between the Respondents and Direct Line. We therefore find that the Respondents are a successor to Direct Line.

Accordingly, as we have found that the Respondents constitute a single employer, the Union made a proper demand for bargaining, and the Respondents are a successor to Direct Line, we find that the Respondents, in failing to recognize and bargain with the Union, violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Hydrolines, Inc. and TNT Hydrolines, Inc. constitute a single employer.

2. Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO has been and

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[41] The predecessor had owned a motel and hotel, three restaurants, two lounges, two gift shops, two warehouses, a bait store, an apartment complex, a bar, and attraction park and boats. The predecessor sold the attraction park and boats and the hotel to two other parties; the predecessor sold a restaurant, lounge, bar, warehouse, and gift shop to the alleged successor, and retained its other assets.

[42] Id. at 1519–1520, as quoted from *Stewart Granite*, supra.

[43] In *Nova* the predecessor was a statewide cleaning operation which had a contract with Mechanics National Bank. The alleged successor successfully solicited a janitorial contract for part of the bank's facilities. The predecessor had a total of 300 employees statewide, and had used about 11 or 12 of these employees to take care of that part of the bank's janitorial operations which were taken over by the alleged successor. The alleged successor had a total complement of 36 employees and used 10 of these employees at the bank's facilities. Eight of the 10 had been employed by the predecessor. The Board found that there had not been a ''substantial continuity in the employing enterprise'' and that the new employer was not a successor.

The holding in *Nova*, however, must be limited to the facts of that case. In *Nova*, as we do here, the Board examined the totality of the circumstances. Certain factors, including particularly that the ''successor'' unit requested by the union was only a very small part of the predecessor's unit and that a third company had taken over a large part of the predecessor's work convinced the Board that there was not a substantial continuity in the employing industry.

[44] In *Boston-Needham*, supra, on facts similar but somewhat different from those in *Nova* (the predecessor in *Nova* was the same as the one in *Boston-Needham*), the Board, based on all the circumstances, found no substantial change in the employing industry. As noted by the court in *Boston-Needham*, in commenting on the distinctions the Board drew between that case and *Nova* ''this is a field [successorship] where intricate line drawing must be done.'' *Boston-Needham*, 526 F.2d 74, 77 (1st Cir. 1975).

[45] Although Janet Mihm was the only managerial or supervisory personnel of the Respondents who had formerly been employed by Direct Line, this is not of overriding importance because other factors persuade us of the continuity of the employing industry. See *Boston-Needham*, supra at 27.

is the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

3. The following employees constitute a unit that is appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time crew members employed by the Employer on its vessels including captains, engineers, deck hands, and assistant deckhands, excluding all yard personnel, office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. Respondents Hydrolines, Inc. and TNT Hydrolines, Inc. are successors of Direct Line.

5. The Union made a valid bargaining demand on May 10, 1989.

6. By failing and refusing to recognize and bargain collectively with the Union as the exclusive representative of the Respondents' employees in the appropriate unit since May 19, 1989, the Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The Respondents' unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union, we shall order them to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. Because the Respondents' employees are on-vessel employees who would not be likely to see a notice posted at the Respondents' facility, we shall require the Respondents to mail copies of the notice to all current unit employees as well as former unit employees employed at the time of the unfair labor practices.

ORDER

The National Labor Relations Board orders that the Respondents, Hydrolines, Inc. and TNT Hydrolines, Inc., Wayne, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit described below.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time crew members employed by the Employer on its vessels including captains, engineers, deckhands and assistant deckhands, excluding all yard personnel, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Wayne, New Jersey, and mail to all current unit employees and former unit employees employed at the time of the unfair labor practices (i.e., at their last known address) copies of the attached notice marked ''Appendix.''[46] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 333, United Marine Division, International Longshoremen's Association, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time crew members employed by the Employer on its vessels including captains, engineers, deckhands and assistant deckhands, excluding all yard personnel, office clerical employees, professional employees, guards and supervisors as defined in the Act.

HYDROLINES, INC. AND TNT HYDROLINES, INC.

Gary A. Carlson, Esq., for the General Counsel.
Timothy I. Duffy, Esq. and *Michael S. Stein, Esq. (McElroy, Deutsch & Mulvaney)*, of Morristown, New Jersey, for Hydrolines, Inc. and TNT Hydrolines, Inc.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. In broad terms, the complaint alleges that Hydrolines, Inc. and TNT Hydrolines, Inc., as a single employer, is the successor to part of the business it bought from a company which is still operating and that they failed to bargain collectively with the Union which represented the employees of the company which sold that part of its business. The detailed allegations of the complaint, and the responses thereto in the answer, present the following questions:

1. Whether Hydrolines, Inc. (Hydrolines) and TNT Hydrolines, Inc. (TNT) operate as a single business enterprise and constitute a single employer within the meaning of Section 2(2) of the National Labor Relations Act (Act).

2. Whether the alleged single enterprise (Hydrolines-TNT) is the successor to Harbor Commuter Service, Inc. and Harbor Commuter Holdings, Inc. (collectively Direct Line).

3. Whether the Union demanded recognition as exclusive collective-bargaining representative for the employees in the unit described below in paragraph 4.

4. Whether a majority of the employees in the unit described below had been unit employees at Direct Line represented by the Union:

> All full-time and regular part-time crew members employed by Hydrolines-TNT on its vessels including captains, engineers, deckhands and assistant deckhands but excluding all yard personnel, office clerical employees, professional employees and supervisors as defined in the Act.

5. Whether Hydrolines-TNT violated Section 8(a)(1) and (5) of the Act by having refused to answer the Union's request for recognition as bargaining representative in the unit described above.

The hearing was held in Newark, New Jersey, on December 18, 19, and 21, 1989. On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and by Hydrolines-TNT, I make the following

FINDINGS OF FACT

I. COMMERCE AND LABOR ORGANIZATION

Hydrolines, a corporation with its office in Wayne, New Jersey, is engaged in the business of owning, operating, and chartering vessels and of providing waterborne commuter and charter services. Its direct out-of-state purchases exceed $50,000 annually.

TNT has its office at the same location in Wayne, New Jersey, as Hydrolines and is engaged in the business of providing commuter ferry service. It derives in excess of $50,000 annually from its operations in transporting passengers from New Jersey to New York.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Background*

1. Direct Line's operations

On March 8, 1989, the Board issued a Decision and Certification of Representative in Case 22–RC–9976, certifying the Union as the exclusive collective-bargaining representative of all employees employed on the vessels of Harbor Commuter Service, Inc., d/b/a Direct Line. The unit includes captains, engineers, deckhands and assistant deckhands and excluded all yard personnel, office clerical employees, professional employees, guards and supervisors as defined in the Act. In its decision, the Board had overruled Direct Line's objection to the conduct of the election held on September 16, 1988, in which 26 employees had voted for representation by the Union, 5 against, with 2 challenged ballots.

Direct Line operates ferry services for people commuting between various points in New Jersey and locations in New York City. The Union and Direct Line signed a collective-bargaining agreement effective April 10, 1989, to April 10, 1992.

2. How Hydroline and TNT were formed and operated

In 1976, John Arwood was responsible for developing new business for an Australian-based company, TNT Limited (Limited). In 1986, Limited formed the company, referred to as Hydrolines. Arwood took over ownership of Hydrolines in 1987. In February 1988, Limited formed the company (TNT), and appointed Arwood as its chairman. TNT, as a subsidiary of a foreign corporation, is barred by law from owning vessels operating on U.S. waterways. In 1988, Hydrolines contracted, for a sum in excess of $12 million to have a catamaran built and delivered. The catamaran is a high-speed vessel suitable for use by commuters.

The catamaran was delivered to Hydrolines in February 1989. Hydrolines commenced the process of obtaining permits and making other arrangements necessary for it to operate a ferry commuter service, with this high-speed vessel, between New York City and points along the New Jersey shore. It hired several crewmembers and began trial runs, without passengers. The Union's general organizer, James Morrissey, testified that he knew of these trial runs at the time he was negotiating a contract with Direct Line.

B. *The Transfer of Certain Assets of Direct Line*

While Hydrolines was preparing to set up its commuter service, Direct Line was actually providing ferry commuter service to New York City from various points in New Jersey, including the shore area.

In March 1989 (about the time the Union was certified as noted above), the president of Direct Line, Walter Mihm, met with Arwood. Mihm indicated that Direct Line would not be able to compete, on some of its routes, with the high-speed service to be offered by Hydrolines and proposed selling some of Direct Lines's surplus vessels to Hydrolines. Hydrolines and TNT both entered into negotiations with Direct Line which led ultimately to the transfer of certain assets to them by Direct Line, pursuant to an agreement dated April 14, 1989. Direct Line thereby chartered six vessels to Hydrolines, agreed that it would not operate a ferry service from Keyport or Highlands, New Jersey, to pier 11, New York City, leased office and maintenance facilities at Belford, New Jersey, to TNT and sold barges to TNT. TNT agreed to honor Direct Line tickets; TNT and Hydrolines further stated in the April 14 agreement that they intended to consider hiring Direct Line's employees to perform work encompassed by the agreement.

Hydrolines and TNT also entered into an interim operating agreement with Direct Line to cover operations during the period of time between April 14, the date of the agreement, and its closing date, May 8, 1989. TNT issued a press release, announcing that it will ''continue to provide [Direct Line's] all-water commutation service between the New Jersey bayshore and lower Manhattan.'' During the transition period, between April 14 and May 8, TNT operated the service, using crews employed by Direct Line.

C. *Direct Line's Operations*

Direct Line has continued to provide ferry commuter service from other locations in New Jersey to New York City.

D. *The Unit*

Prior to May 8, TNT's president, Thomas Bruyere, and Arwood interviewed applicants seeking jobs as crewmembers. The following 10 individuals, who had worked for Direct Line, each in the capacity as listed alongside his respective name, were hired by Hydrolines:

Russell Adams	engineer
Gary Dunzelman	port captain
Daniel Florio	engineer
Brian Haines	mechanic
Jimmy Haines	mechanic
Redden Koch	captain
Martin Plage	captain
John Ralph	deckhand
Brendan Pryor	deckhand
Harold Smith	deckhand

Hydrolines already had, by mid-April, five other crewmembers in its employ. As noted above, the catamaran was, prior to May 8, conducting trial runs and, presumably, these five were its crew then. The names and job classifications of these five are:

Martin Grzeszack	engineer
Lyndon Kibler	service captain
Mark Marcellus	captain
John Metzler	deckhand
Lester Starnes	deckhand

Another individual, Judy Prish, applied on May 17, 1989, according to her application form, for a job as bartender. Other personnel documents show that she began working as a salaried ''bartender-deckhand'' on May 22.[1]

Of the 16 individuals named above, General Counsel contends that 4 should be excluded from the unit and that 8 of the remaining 12 are employees who came from the Direct Line unit. Hydrolines asserts that all 16 should be included and that only 7 came from the Direct Line unit.[2] The unit placement of each of the individuals in dispute is discussed next.

1. Gary Dunzelman

Hydrolines contends that he was a supervisor within the meaning of the Act when he worked for Direct Line and thus was not an employee in the Direct Line unit when he interviewed for and was hired as a unit employee by Hydrolines. General Counsel contends that Dunzelman should be included as one of the eight Direct Line employees who comprise the majority of the unit described above.

Dunzelman had been employed by Direct Line as its port captain. In that capacity, he scheduled the assignments, the vacation periods, and holidays of the crewmembers. He worked in the Direct Line office until late 1988 when he also took over the responsibilities of a captain aboard one of Direct Line's vessels. He was responsible for the hiring and firing of employees and received $200 a week more than vessel captains and also fully paid medical benefits to compensate him for his duties as port captain—duties he performed until his employment with Direct Line ended, when he joined Hydrolines.

General Counsel placed in evidence a card signed by Dunzelman in August 1988 in which he applied for membership in the Union. General Counsel offered the testimony of the Union's general organizer. He related that he and the owner of Direct Line had agreed, after the Union won the election referred to above, to include Dunzelman in the Direct Line unit.

Dunzelman testified that he signed the union card because he believed that the Union would seek his ouster as port captain. He did not vote in the Board-conducted election noted above. Dunzelman testified that he had been given to understand that he was ineligible as part of Direct Line's management.

The evidence is clear that, while in Direct Line's employ, Dunzelman was a supervisor as defined in the Act and not

[1] Arwood testified that other records which he examined disclosed different dates for Prish. Those other records were not produced. I am unable to rely on his recollection as to the contents of these other records.

[2] Neither side would include Janet Mimh, the daughter of Direct Line's owner and who is ''base manager,'' having been employed by Hydrolines in mid-April.

properly part of the unit. Any agreement by Direct Line to include him nonetheless obviously cannot change the essential fact, that he was a supervisor who later became a nonsupervisory employee of Hydrolines. General Counsel still would include him among the eight represented by the Union based on his having signed a union card. That card obviously was to be effective whenever he was employed as a unit employee of Direct Line—a circumstance that never eventuated as he was always a supervisor there. More significantly, General Counsel's case is not premised on a bad-faith refusal to recognize a card majority but on the consequences of the Board's successorship doctrine. On that point, the simple fact is that Dunzelman was a supervisor, not in the Direct Line unit; he is a unit employee of Hydrolines. I shall then exclude him from the number of Direct Line unit employees hired in the Hydrolines unit.

2. Brian Haines and Jimmy Haines

They had worked for Direct Line as mechanics and were excluded, as yard personnel, from the certified unit. They are working in substantially the same capacity for Hydrolines, except that on occasion they go above vessels while enroute to service them. Notations on Hydrolines' payroll register disclose that they are ''nonvessel'' employees.

They were not unit employees at Direct Line and are properly excludable from the Hydroline unit as nonvessel employees.

3. Lyndon Kibler

He was never in Direct Line's employ. Hydrolines would include him in its own unit whereas General Counsel would exclude him as a supervisor.

Kibler was hired by Hydrolines as a ''senior captain'' to whom all crew members report. He has authority to approve a crewmember's request to take a day off from work. He sees to it that all boats are manned to meet the scheduled sailings and to fill crew vacancies as needed. In general, his duties include the coordination of the work of, and the supervision of, employees on board Hydrolines' vessels.

Kibler possesses at least one of the indicia of supervisory status as set forth in Section 2(11) of the Act and is thus a supervisor. I shall therefore exclude him from the Hydrolines' unit.

4. Judy Prish

She applied to Hydrolines for a bartender position aboard one of its vessels on May 17. As noted below, this was a week after the Union demanded recognition of May 10. As she was not employed as of May 10, I shall exclude her.[3]

E. *Summary*

Of the 12 unit employees as of the date of the Union's recognition demand, 7 had been unit employees at Direct Line.

[3] Counsel for TNT-Hydrolines argues that as she applied before Arwood's reply of May 19 to the Union's demand either (discussed elsewhere in this decision), she should be included. I find no merit in that contention.

F. *The Union's Demand*

On May 10, 1989, the Union wrote to Thomas Bruyere, TNT's president, as follows:

> As you may know, we are the collective bargaining representative of the bargaining unit employees employed by (Direct Line), including those who work on the boats and routes, that your company has recently purchased from Direct Line.
>
> Under federal labor law, we continue to be the collective bargaining representative of your former Direct Line employees and your Company is required to recognize us as such and bargain with us over the terms of a contract.
>
> Please contact me as soon as possible to schedule a negotiating meeting, so that you may have an idea of what we desire in a contract. We have enclosed a copy of (the Union's) contract with Direct Line.

Arwood, on behalf of Hydrolines, wrote to the Union on May 19, as follows:

> Mr. Bruyere of (TNT) has forwarded your letter dated May 10 to my attention. (TNT) is not an employer of any employees formerly in the Direct Line bargaining unit.
>
> Your letter of May 10 indicates that you continue to be the collective bargaining unit for former Direct Line employees now employed by our company. All employees of this company, including any who formerly worked for Direct Line, have been employed as a result of their direct application to this company for employment. We have not agreed with Direct Line to employ, nor have we in fact employed, all of the employees performing all of the work that you indicate is covered by your Collective Bargaining Agreement. We did not purchase (Direct Line), nor a majority of its assets.
>
> Hydrolines does not recognize (the Union), as the bargaining representative of our employees.

G. *Analysis*

The complaint alleges that TNT-Hydrolines, since May 19, 1989, failed and refused to bargain collectively with the Union, in violation of Section 8(a)(1) and (5) of the Act, as the exclusive collective-bargaining representative of the unit comprised of all full-time and regular part-time crewmembers. The reference to May 19 obviously is to Arwood's letter of that date. A careful reading of that letter and also of the Union's demand letter of May 10 discloses that TNT-Hydrolines rejected the Union's demand for recognition in a unit comprised only of those crewmembers who were formerly in Direct Line's employ. Although the Union was aware, when it was negotiating with Direct Line, that the catamaran was on trial runs with crewmembers who obviously were not in the Direct Line unit, the Union never sought to represent those non-Direct Line employees.

To use the language employed by Judge Fish in *EDP Medical Computer Systems*, 284 NLRB 1232, 1282 (1987), because the unit alleged as appropriate in the complaint deviated substantially from the unit in which the Union demanded recognition, no proper demand for recognition was made by the Union. Accordingly, I am compelled to dismiss

the complaint. See *Chester Valley, Inc*., 251 NLRB 1435, 1450 (1980).

In view of the above, it is unnecessary to decide the other issues posed by the pleadings. In the event the Board were to determine, however, that the Union made a proper demand, the Board may also wish to have before it then the following findings.

1. The single-employer issue

TNT-Hydrolines obviously functions as an integrated business enterprise. Hydrolines leases or owns the vessels and hires the crews; TNT operates the vessels and directs the crews. Bruyere, the president of TNT, screened applicants for Hydrolines. The history of Hydrolines is enmeshed with the operations of TNT's parent, Limited.

In view of the integrated operations, common management, common control of labor relations, and the totality of the evidence, I find that TNT-Hydrolines operates as, and is, a single employer and together constitute an employer within the meaning of Section 2(2) of the Act. See *Professional Eye Care*, 289 NLRB 738 (1988).

Counsel for TNT and for Hydrolines has argued that they cannot be a single employer as they are two separate corporate entities with separate owners and books of accounts. For corporate, for tax, for maritime, and perhaps for other purposes all that is true. For purposes of the Act, however, they comprise a single employer.

2. The successor issue

Seven of the 12 employees had been in the Direct Line unit represented by the Union and those employees are engaged in providing ferry commuter services between points which had been served by Direct Line. However, the very reason Direct Line sold that part of its business demonstrates that TNT-Hydrolines is not its successor. TNT-Hydrolines was readying its catamaran to compete with Direct Line. The sale of some of Direct Lines vessels to Hydrolines and Direct Line's abandonment of the route that TNT-Hydrolines already had committed itself to use resulted in an amalgam of part of Direct Lines operations with those of TNT-Hydrolines, and under separate immediate supervision. TNT-Hydrolines' use, prior to the sale, of a catamaran valued at in excess of $2 million the catamaran's speed that offered an entirely new commuting concept and its crew supervised by Kiebler, cannot be said to be matters that constitute a mere appendage to a fleet consisting of just the vessels leased from Direct Line, and to a union crew of just seven former Direct Line employees. Cf. *Nova Services Co*., 213 NLRB 95 (1974).

I thus find that TNT-Hydrolines was not the successor to part of Direct Line's operations.

CONCLUSIONS OF LAW

1. TNT-Hydrolines is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. TNT-Hydrolines did not violate Section 8(a)(1) and (5) of the Act by its refusal to honor the Union's request for recognition as exclusive collective-bargaining agreement of those crewmembers who had formerly been employed by Direct Line.

[Recommended Order for dismissal omitted from publication.]